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No. 80-100

IN THE

Supreme Court of the United States

October Term, 1980

THE LORAIN JOURNAL COMPANY,
THE NEWS-HERALD, and
J. THEODORE DIADIUN,
Petitioners,

v.

MICHAEL MILKOVICH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO

MOTION OF THE OHIO NEWSPAPER ASSOCIATION TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE OHIO NEWSPAPER ASSOCIATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Ohio Newspaper Association hereby respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case. The consent of counsel for the petitioners has been obtained, but the Ohio Newspaper Association has been unable to obtain the consent of counsel for respondent.

The Ohio Newspaper Association (hereinafter "ONA") is a non-profit corporation organized and existing under the laws of the State of Ohio. Its membership consists of approximately 250 daily and weekly newspapers in Ohio, representing the major proportion of the circulation of newspapers in this state.

The ONA was organized to promote the best interests of its publishers and their readers. It has appeared as *amicus curiae* representing the interests of that membership in the Ohio courts. By design, the ONA's structure keeps it in contact with the membership on a variety of points of legal as well as operational interest. The ONA feels, therefore, that it is in a unique position to represent the concerns of the collective Ohio press in this matter.

It is from that perspective that the ONA voices its support for this Court's granting of the petition for certiorari. The decision of the Ohio Court of Appeals in this case, that a newspaper may not contradict or comment on the testimony of a public figure who has prevailed at trial, creates an uncertainty and hesitancy in the working press which is contrary to the spirit of this Court's decisions on the freedom of press clause in the first amendment. That unique proposition of law is a two-edged sword, both blades of which strike against the Ohio press. The press will either restrain itself from reporting disfavorably on public figures who appear in judicial proceedings, or it may continue to present such reports but face an increased risk of litigation with more probable exposure to liability. Either choice, restraint or a fear of litigation, would have a chilling effect on the Ohio newspapers' exercise of the first amendment freedom of the press. *See, Time Inc. v. Hill,* 385 U.S. 374 (1967); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

Thus, the ONA asks leave of this Court to file its brief *amicus curiae* in support of the writ of certiorari. Even while recognizing this Court's reluctance to add to its burden by granting leave to file *amicus curiae,* we nevertheless be-

lieve and respectfuly represent that the uncertainty created by the decision appealed from is damaging to the public interest and, if followed, will restrain the working press in the fulfillment of its first amendment responsibilities. Resolution of this issue will have significant consequences for the Ohio press who provide news and information to the general public. The ONA hopes that its desire to present the concerns of those most seriously affected will provide assistance to the Court in resolving the constitutional issues which appear in this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The Ohio Newspaper Association, as *amicus curiae* in support of the petition for writ of certiorari in this case, agrees with and adopts those matters presented by petitioners as required by Rule 21 of this Court to be set out in advance of argument amplifying the reasons relied on for the allowance of the writ.

ARGUMENT IN SUPPORT OF REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

The Ohio Newspaper Association, as *amicus curiae,* respectfully urges this Court to grant the petition for certiorari in this case to determine the degree of protection the first amendment affords the press when it refutes the honesty of a public figure's testimony in a prior judicial proceeding. The Supreme Court of Ohio has let stand a decision by the Eleventh District Court of Appeals of Ohio holding that a trial court in a libel action may not – as a matter of law – direct a verdict for a defendant newspaper against a public figure whose testimony at a separate, non-libel trial has been accepted by that other trial judge. This *amicus curiae* submits that this decision is not, should not, and cannot be found consistent with either the recent history of this Court's decisions or the constitutional provisions of the first amendment applicable to the free press.

As appears more fully herein, the decision below has had and will continue to have a dramatic impact on the newspaper industry of this state. The consequential self-restraint which the Ohio press now faces has a direct bearing upon the gathering and dissemination of news. The *ratio decedendi* of this case rests in these two sentences by the Court of Appeals:

> Thus any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute "actual malice" so as to be actionable libel of a public person. Whether, in a given case, it constitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the Court.

It may, however, be more plainly put for the effect it has on the Ohio press: neither a party who prevails at trial or

one of his witnesses, regardless of his stature as a public figure, may have his veracity challenged by the press. That novel proposition, that even a judicial determination where a witness's honesty is not at issue constitutes the unassailable truth, leaves the press in a state of uncertainty and requires clarification. Taken at its face value, the decision leaves the press little choice but to retreat to a position of self-censorship that this Court has perceived as dangerous and has so carefully guarded against since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

There must be no doubt that this case concerns federal constitutional issues, and not state law. The decision to reverse the trial court did not rest upon an application of the Ohio standard governing the propriety of directed verdicts. The decision that public figures are shielded from critical comment by the press after testifying at a separate trial was the necessary predicate for the action taken by the Court of Appeals. In effect, the Court of Appeals translated a question of constitutional law properly to be decided by the trial judge into a question of fact to be decided by a jury. That decision, conflicting as it does with the interpretations this Court has made of the actual malice standard, has created a constitutional issue which requires final resolution in this forum.

The urgency for action by this Court is apparent if the alternatives are kept in mind. As recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the fact that the state appellate courts have remanded a case for further trial proceedings after having finally determined a federal constitutional issue is not preclusive of this Court's jurisdiction. To the contrary, where the "failure to decide the question now will leave the press . . . operating in the shadow of the civil . . . sanctions of a rule of law . . . the constitutionality of which is in serious doubt," this Court's consideration of that federal issue is particularly appropriate. *Id.* at 486. Immediate review is thus called

for when "[d]elaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' 'an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press.'" *Id.* at 485-486 (citations omitted). That spectre of years of uncertainty on the part of the working press in Ohio is what affords the compelling reasons for allowing this writ of certiorari.

While considering the particularities of this case and the urgencies for their consideration here, this *amicus curiae* would recall a few of the propositions regarding the freedom of press which this Court has endorsed. Nearly forty years ago it was recognized that "it is a prized American privilege to speak one's mind, although not always with perfect good taste . . . ." *Bridges v. California*, 314 U.S. 252, 270 (1941). To that end, and "to insure the ascertainment and publication of the truth about public affairs," the Court has required "that the First Amendment protect some erroneous publications as well as true ones." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). Indeed, as recognized by Mr. Justice Stewart in his seminal speech to the Yale Law School, the press has "sometimes been outrageously abusive, untruthful, arrogant, and hypocritical. But it hardly follows that elimination of a strong and independent press is the way to eliminate abusiveness, untruth, arrogance, or hypocrisy from government itself." Stewart, *Or of the Press*, 26 Hastings L. J. 631, 636 (1975). As the law of this case now stands, it not only conflicts with those ideals, but "savages the cherished values encased in the First Amendment." *Time Inc. v. Firestone*, 424 U.S. 448, 476 (1976) (Brennan, J., dissenting).

Because this case concerns the issue of where "the line between speech unconditionally guaranteed and speech which may legitimately be regulated" will be

drawn, *Speiser v. Randall*, 357 U.S. 513, 525 (1958), it is appropriate to follow the established rule that this Court will inquire as to whether the court below correctly applied the constitutional standard to the facts of the case. *New York Times Co.* at 285; *Time Inc. v. Pape*, 401 U.S. 279 (1971). Both the facts of this case and at least the initial constitutional standards are clear and relatively undisputed.

Ted Diadiun, a reporter and petitioner, attended a 1974 high school wrestling match in which one of the teams was coached by the respondent, Michael Milkovich. The reporter saw the match turn into a brawl after which four of the other team's members received hospital treatment. In Diadiun's view, and as he reported it at the time, the respondent's behavior contributed to the combative atmosphere and the brawl which occurred. The Ohio High School Athletic Association (hereinafter the "OHSAA"), the body which sponsors and governs interscholastic athletics in Ohio, held an administrative hearing of inquiry which Diadiun attended. The hearing, at which respondent Milkovich testified on his own behalf, resulted in the suspension of Milkovich's team from the state wrestling championships and a public censure and two year probation for the respondent.

Soon after, a suit for injunctive relief was filed on behalf of the wrestlers in state court. That action resulted in a preliminary injunction banning the OHSAA from carrying on its suspension against the respondent's team. As a result of that suit, two items significant to this case occurred. First, reporter Diadiun wrote the allegedly libellous article in which he claimed that Milkovich lied in his testimony during the injunction hearing. Second, the court below held as a matter of law that the result of the preliminary injunction hearing determined the veracity of Milkovich's testimony and precluded the trial court at the ensuing libel trial from deciding as a matter of law that Milkovich had not shown with convincing clarity the

actual malice necessary to prevail in a libel action against the press by a public figure.[1]

There are several other significant facts. The court that issued the injunction did not decide or even recite in its opinion anything regarding the testimony concerning the actual events of the 1974 wrestling match, but only held that due process required that the high school wrestlers not be deprived of participating in the state championships as a result of the type of hearing held by the OHSAA. Reporter Diadiun did not attend the injunction hearing, but he conferred three separate times with Dr. Harold Meyer, then Commissioner of the OHSAA, who did attend that hearing as well as the OHSAA proceedings, and whose reports lead Diadiun to conclude that Milkovich's testimony differed markedly from that before the OHSAA and from the facts observed by Diadiun at the wrestling match itself.

The constitutional standards applicable to this case are clear up to the novel concept of insularity from attack devised by the Ohio Court of Appeals below. Because the respondent was found to be a public figure, the requirement of actual malice as recently summarized by this Court became an essential element of his case:

> Under this rule, absent knowing falsehood, liability requires proof of reckless disregard for truth, that is, that the defendant "in fact entertained serious doubts as to the truth of his publication." . . . Such "subjective awareness of probable falsity," . . . may be found if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

Herbert v. Lando, 441 U.S. 153, 157 (1979) (citations omitted). *See also, Curtis Publishing Co. v. Butts*, 388 U.S.

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[1] Milkovich's status as a public figure was determined by the trial court in this case and was not an issue on respondent's appeal. The evidence showed that he was a prominent wrestling coach with substantial national and regional recognition in the wrestling sport world.

130 (1967), and *New York Times Co., supra.* To prevail, actual malice must be proven with convincing clarity. *Herbert,* 441 U.S. at 170. Based upon this Court's admonition in *New York Times Co.* that the press not be subjected to "the pall of fear and timidity imposed upon those who would give voice to public criticism," 376 U.S. at 278, it is also now commonly held that "[a]ctual malice is a constitutional issue to be decided initially by the trial judge vis-a-vis motions for summary judgment and directed verdict." *Bon Air Hotel, Inc. v. Time Inc.,* 426 F.2d 858, 864 (5th Cir. 1970). *See also, Wasserman v. Time Inc.,* 424 F.2d 920, 922 (D.C. Cir. 1970) (Wright, J., concurring), *cert den.* 398 U.S. 940 (1970).

Against this background, the trial court directed a verdict against respondent by finding that the evidence did not meet the constitutional standard of actual malice with convincing clarity. The reversal of that decision, predicated erroneously on the supposition that a prevailing party in another lawsuit receives a shield from attack in the press, also ignored the several other amplifications by this Court of what does not constitute actual malice. Hatred of the libel plaintiff, for example, cannot be the standard for showing actual malice, for that would inhibit the functioning of the press. *Greenbelt Cooperative Publishing Ass'n v. Bresler,* 398 U.S. 6 (1970). Investigatory failure similarly does not meet the test. *Curtis Publishing Co.,* 388 U.S. at 153. Neither does reliance upon the reports of others, even when coupled with a failure to make an independent investigation prior to publishing. *New York Times Co.,* 376 U.S. at 287-288. Indeed, the reversal of the directed verdict here seems to completely ignore this Court's decision in *St. Amant v. Thompson,* 390 U.S. 727 (1968), in which the defendant, like the reporter here, had no personal knowledge of the immediate event spoken of, relied on the word of another as to the truth of that event, made no attempt to verify the event with others who might

also know about it, did not even consider the possibly defamatory nature of his statement, but whose behavior was found by this Court to fall short of the reckless disregard of the truth necessary to show actual malice.

Even more insidious to the press, and crying equally for clarification by this Court is the Ohio Court of Appeals suggestion that direct personal inquiry was required of the reporter to avoid the risk created by its decision. The court below commented that, instead of relying on the report of an informed source who did attend the trial, Ted Diadiun should have either personally attended the injunction trial, or ordered and read its transcript, if he wanted to avoid being found in reckless disregard for the truth. In light of the obvious burden such a requirement would put upon the press, its potential chilling effect is manifest. The timeliness of reporting a newsworthy event has already been considered favorably to reporters by this Court in a decision involving contempt convictions for reporting on ongoing cases. *Bridges v. California,* 314 U.S. 252 (1941).

But it is the function of the press, particularly in its role as reporter and commentator on judicial proceedings, that begs for a review of this case in this forum. It is clear that society relies on the press for reporting on that judicial process and that the press serves "to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492 (1975). It has even been recognized that court procedure and legal conclusions which at times confound the professional are by their nature more difficult for the layman to interpret and report than are other areas of public concern. *Pennekamp v. Florida,* 328 U.S. 331, 371 (1946) (Rutledge, J., concurring).

It is equally clear that good and bad decisions result from courtroom proceedings and judicial determinations. No one has yet ventured the temerity to suggest the in-

fallibility of what emanates from the bench. No one, that is, but the court from which this petition is brought.

The Ohio Newspaper Association as *amicus curiae* does not intend to suggest that the mere holding of a press card provides a license to irresponsibly attack the integrity of another. But that is not what happened here. The reporter had a background of personal knowledge regarding the facts of this case, and he inquired several times of an informed observer as to the testimony of the respondent at trial. Yet because the side for which the respondent testified prevailed on a procedural due process issue, the press is forbidden from commenting on the truthfulness of that testimony.

At least insofar, then, as the Ohio court's decision on these facts pertains, the press is to be discouraged from unfavorably commenting on the substance of a witness's testimony whose side prevails on a nicety of procedural law. Henceforth, a civil litigant whose veracity at trial is conclusively impugned but who late in the game succeeds on jurisdictional or other grounds is immune from comment in the press because, in the words of the court below, the comments "in the news article were made after judicial ascertainment of where the truth lay." That should not be the inhibiting rule by which the Ohio press must play.

If the motion for certiorari is denied and this case returns for trial under the rule of the Court of Appeals, the Ohio press will find itself on the horns of a dilemma. A favorable verdict for the publisher will leave unanswered an important and threatening constitutional question. A verdict for the respondent will find the defendant publisher knocking at the door of this Court again, but only after an extended appeal process repeating what brings us here now. In the meantime, and in either event, the Ohio press will be forced to function over a period of years under a cloud of uncertainty and confusion with at least a degree of timidity and self-censorship. That result would be to

the public's detriment and contrary to the purpose and intent of the constitutional safeguards afforded the press.

CONCLUSION

Based upon all of the foregoing, and the fact that the court below has decided an important question of federal law that has not been, but should be, settled by this Court and which conflicts with the applicable decisions of this Court, this *amicus curiae* respectfully urges that the petition for certiorari be granted and that this case be heard upon its merits.

Respectfully submitted,

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